

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CANCELLATION
OF A CEASE AND DESIST ORDER
ISSUED BY THE DEPARTMENT OF
ECOLOGY TO JOHN A. and ESTER
NELSON,

LLOYD F. and MARGARET C. FULLER,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
JOHN A. and ESTER NELSON,

Respondents.

SHB No. 83-21

ORDER GRANTING SUMMARY
JUDGMENT ON GROUNDS OF
NO JURISDICTION

On June 16, 1983, respondents John A. and Ester Nelson filed their
"Motion for Summary Dismissal of Appellants' Claim" in this matter.
Respondent Department of Ecology joined in support of this motion.
The motion was opposed by appellants Lloyd F. and Margaret C. Fuller.

Having heard the oral argument of counsel for all parties on
July 13, 1983, at Lacey, Washington, having read the written

1 memorandum filed by each party together with the records and files
2 herein, and being fully advised, the Board rules as follows:

3 1. In the prior, companion case to this one, Nelson v. DOE and
4 Fuller, SHB No. 79-11, we reviewed our jurisdiction to hear appeals
5 from shorelines regulatory orders of the Department of Ecology (DOE).
6 Such review was then provided by WAC 173-14-190, a rule promulgated by
7 DOE. We concluded that the Board lacks jurisdiction to hear such
8 appeals. That decision is attached, and incorporated herein by this
9 reference.

10 2. Subsequent to our decision in SHB No. 79-11, above, DOE
11 repealed its rule by conferring jurisdiction upon this Board.

12 3. There is no genuine issue of material fact in this matter.

13 4. There is no legally significant distinction between the facts
14 of the prior case (SHB No. 79-11), which involved a shoreline
15 regulatory order staying construction, and this case which involves a
16 shoreline regulatory order cancelling the first order. We conclude
17 that the Board lacks jurisdiction to hear this matter and enter the
18 following:

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26 ORDER GRANTING
27 SUMMARY JUDGMENT
SHB No. 83-21

ORDER

Respondent's Motion for Summary Judgment is granted and this matter is dismissed for lack of jurisdiction.

DONE at Lacey, Washington, this 1st day of August, 1983.

SHORELINES HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Chairman

David Akana
DAVID AKANA, Lawyer Member

A. H. O'Meara
A. H. O'MEARA, Member

Rodney Kerslake
RODNEY KERSLAKE, Member

Nancy Burnett
NANCY BURNETT, Member

(See Dissent)
LAWRENCE J. FAULK, Member

1 PAULK, Member, Dissenting:

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3 This matter came before the Shorelines Hearings Board on motion of
4 appellants. The parties filed written argument and supportive
5 documents.

6 The issue raised in the motion is whether this Board has
7 jurisdiction to hear and decide the matter(s) raised in the notice of
8 appeal; i.e., whether the issuance by respondent Department of Ecology
9 of an enforcement order is appealable to this Board.

10 The underlying question is whether such appeals are within the
11 scope of authority delegated to the Shorelines Hearings Board by the
12 legislature in the passage of the Shoreline Management Act of 1971.

13 The test for delegation to an administrative tribunal has been
14 stated as follows in STASON & COOPER, CASES AND OTHER MATERIALS ON
15 ADMINISTRATIVE TRIBUNALS 5 (3d ed. 1957):

16 In a word, then, we look for the rights, duties,
17 powers and privileges of administrative tribunals in
18 either the express language or the implications of
statutes all construed in the light of prevailing
constitutional limitations.

19 (To the knowledge of this author, there have been no cases in
20 Washington dealing directly with the scope of power of a legislatively
21 created administrative tribunal.) It is reasonable to expect,
22 however, that the Washington courts would fashion a similar test to
23 that quoted above from Stason and Cooper.

24 In reviewing the authority of one state agency, the
25 no-longer-existent Department of Public Service, the State Supreme
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1 Court applied the following test:

2 It is well settled in this state, as elsewhere, that
3 a public service commission, such as the department
4 of public service in this state, is an administrative
5 agency created by statute and as such has no inherent
6 powers, but only such as have been expressly granted
7 to it by the legislature or have, by implication,
8 been conferred upon it as necessarily incident to the
9 exercise of those powers expressly granted. State ex
10 rel. P.U.D. v. Dept. of Public Service, 21 Wn.2d 201,
11 208, 209, 150 P.2d 709 (1944).

12 It seems to me that the Shorelines Hearings Board has the
13 necessary jurisdiction by virtue of the above tests. This is true
14 particularly in light of the deference of the appellate courts to the
15 administrative expertise of the Shorelines Hearings Board (Department
16 of Ecology v. Ballard Elks Lodge No. 827, 84 Wn.2d 551, 556, 527 P.2d
17 1121 (1974)), the stress which that the court has placed on the
18 liberal construction of the Shoreline Management Act (Hayes v. Yount,
19 37 Wn.2d 441, 446, 447, 536 P.2d 157 (1975)) and to the equally
20 important policy of ensuring uniform, statewide enforcement of the
21 Shoreline Management Act.

22 The Shoreline Management Act expressly grants authority to the
23 Shorelines Hearings Board to hear reviews of appeals regarding the
24 granting, denying, or rescission of permits issued under the act, as
25 well as appeals of local governments of master programs. RCW
26 90.58.180(1) and RCW 90.58.180(4).


27 It is obvious from reading the statute that the essential area of
Board jurisdiction involves individualized shoreline disputes.

1 It is entirely consistent with this statutory approach to
2 interpret the jurisdiction of the Board broadly to encompass the
3 review of appeals from enforcement orders which are restricted to
4 individualized shoreline disputes. In such appeals, the Board is
5 confined to reviewing precisely the same types of issues that it faces
6 relating to permits.

7 For the Shorelines Hearings Board to review enforcement orders
8 designed to ensure compliance with the provisions of the Shoreline
9 Management Act is necessarily incidental to the jurisdiction of the
10 Board over other cases involving regulation of development on the
11 shorelines of the state through the permit system.

12 This state has, through its appellate courts, adopted the federal
13 approach of allowing a delegation of administrative authority in the
14 absence of specific statutory standards, so long as there exist
15 adequate procedural safeguards. Yakima Clean Air v. Glascom Builders,
16 85 Wn.2d 255, 534 P.2d 33 (1972); Barry & Barry, Inc. v. Department of
17 Motor Vehicles, 81 Wn.2d 138, 500 P.2d 540 (1972); Rody v. Hollis, 81
18 Wn.2d 88, 500 P.2d 97 (1972). As was shown in Yakima, supra, it is
19 clear that adequate procedural safeguards exist, given the right of
20 the appellant to a contested case hearing, as well as the subsequent
21 right of appeal to the courts under the Washington Administrative
22 Procedure Act. WAC 173-14-190(1) and WAC 173-14-190(2).
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1 For the above reasons, I believe that by necessary implication the
2 Board does have the statutory jurisdiction to review enforcement
3 orders of the Department of Ecology.
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6 LAWRENCE J. FAULK, Member
7 Shorelines Hearings Board
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26 DISSENT
27 RCHB No. 83-53
SMB No. 83-21